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2014 APR 15 PH 5: 00

FIRST GENERAL COUNSEL'S REPORT CELA

MUR: 6750

DATE COMPLAINT FILED: 8/20/2013

DATE OF NOTIFICATION: 8/27/2013

LAST RESPONSE RECEIVED: 10/29/2013

DATE ACTIVATED: 12/03/2013

ELECTION CYCLE: 2014

EXPIRATION OF SOL: 1/01/2018 to 6/30/2018

COMPLAINANT:

Guillermo Cabrera

RESPONDENTS:

Carl DeMaio for Congress and Paul Kilgore in his
official capacity as treasurer
Reform San Diego with Carl DeMaio f.k.a. Reform
San Diego
Carl DeMaio

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
2 U.S.C. § 441i(e)
11 C.F.R. § 100.72(a)
11 C.F.R. § 100.131(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

OTHER AGENCIES CHECKED:

California State Disclosure Reports

I. INTRODUCTION

The Complaint in this matter alleges that Reform San Diego with Carl DeMaio ("RSD"),
a city-registered committee founded by congressional candidate Carl DeMaio to support local
ballot measures, violated the Federal Election Campaign Act of 1971, as amended (the "Act"),

1 by soliciting, receiving or directing funds outside the federal source restrictions and using those
2 funds to make excessive in-kind contributions for DeMaio's exploration of a federal candidacy.

3 The RSD Response, adopted by Carl DeMaio and Carl DeMaio for Congress, asserts that
4 RSD's expenditures were all for the purpose of promoting RSD's ballot measure activity and
5 were not for the purpose of promoting DeMaio's congressional campaign.¹

6 Based on the available information, we recommend that the Commission find no reason
7 to believe that Respondents violated 2 U.S.C. §§ 441i(e) or 434(b) in connection with the RSD
8 disbursements cited in the Complaint, and close the file in this matter.

9 II. FACTUAL BACKGROUND

10 Carl DeMaio is a candidate for Congress in the 2014 election for the 52nd Congressional
11 District of California. DeMaio announced his candidacy on May 30, 2013, and established Carl
12 DeMaio for Congress (the "Committee") as his principal campaign committee the same day.²
13 The Committee timely filed its first disclosure report, the 2013 July Quarterly report; the report
14 disclosed no activity prior to May 30, 2013.

¹ RSD Resp. at 4 (Sept. 10, 2013). RSD's response was filed by its treasurer, C. April Bolling, under penalty of perjury. *Id.* at 5. *See also* Carl DeMaio Resp. at 1 (Oct. 17, 2013) (adopting RSD response) and Carl DeMaio for Congress Resp. at 1 (Oct. 29, 2013) (adopting RSD response).

² *See* RSD Resp. at 2. DeMaio asserts that he decided to run for Congress on May 27, 2013, and reached the threshold for becoming a candidate on May 31, 2013. *Id.* DeMaio filed his Statement of Candidacy with the Commission on June 4, 2013.

1 RSD is a ballot measure committee registered with the City of San Diego. RSD was
2 formed in 2004, and DeMaio has been its controlling officer since that time.³ According to RSD,
3 it has been active on ballot measures on the City of San Diego ballot during every election cycle
4 since 2004.⁴

5 In the first half of 2013, RSD disclosed \$27,872.35 in disbursements, the largest of which
6 were \$7,500 for polling and survey research and \$9,000 to a campaign consultant.⁵ During the
7 same time period, it received \$32,954 in monetary donations and \$1,876.19 in non-monetary
8 donations.⁶ These donations consisted of donations from individuals ranging from \$25.00 to
9 \$2,500.00, and from entities including corporations ranging from \$100.00 to \$1,500.00.⁷ RSD
10 received most of these donations during the first quarter of 2013; it received only one donation

³ See RSD Resp. at 1; RSD disclosure reports filed with the City of San Diego Office of the City Clerk (portal at <https://ssl.netfile.com/pub2/Default.aspx?aid=CSD>). RSD was formed under the name San Diego Citizens for Accountable Government. In 2008, after DeMaio was elected to the San Diego City Council, it changed its name to Reforming City Hall with Carl DeMaio "to comply with rules requiring candidate-controlled committees to include the name of elected officials who direct their activities." See http://www.reformsandiego.org/2013_Efforts.html. DeMaio was a member of the San Diego City Council from 2008-2012 and ran unsuccessfully for San Diego Mayor in 2012. See <http://www.sandiego.gov/city-clerk/pdf/mayorresults.pdf>. On May 8, 2013, RSD changed its name to Reform San Diego, with DeMaio still listed as Chair. On September 25, 2013, RSD changed its name again, to Reform San Diego with Carl DeMaio, after DeMaio formed a local candidate committee in connection with the November 2013 special election for San Diego Mayor. Reforming City Hall with Carl DeMaio is registered with the Internal Revenue Service as a section 527 organization.

⁴ See RSD Resp. at 1-2.

⁵ RSD attached to its response its disclosure reports covering January 1, 2010, through June 30, 2013. See RSD 2013 Mid Year Report at 3, 28-33. The disclosure report form does not contain a field for the date of payments made. RSD also disclosed a \$13,892.94 disbursement to DeMaio in repayment of a loan, leaving RSD in debt to DeMaio in the amount of \$18,107.06 on June 30, 2013. See *id.* at 25.

⁶ See *id.* at 3-24, 26.

⁷ See *id.* (disclosing the receipt of donations from sixteen entities totalling \$8,550).

1 after April 4, 2013 — \$100 from a corporation on May 5, 2013.⁸ According to a press article
2 cited in the Complaint, DeMaio stated that as of April 15, 2013, RSD had no staff.⁹

3 The Complaint alleges that RSD impermissibly solicited, received, or directed funds
4 outside the federal source restrictions and used those funds to make excessive in-kind
5 contributions in connection with DeMaio's exploration of a federal candidacy. According to the
6 Complaint, those in-kind contributions were made in the first half of 2013, and include payments
7 for campaign consulting services, polling, office expenses, internet and email services, and a trip
8 to Washington, D.C.¹⁰ The Complaint asserts that a comparison between the amount of money
9 that RSD spent in 2012 (when RSD was active in two ballot measure campaigns) and the larger
10 amount spent in 2013 (when there were no ballot questions before the voters) demonstrates that
11 its 2013 spending was in connection with DeMaio's exploration of a federal candidacy.¹¹

12 RSD responds that the Complainant "provides absolutely no 'evidence' in his complaint,
13 just conjecture" that RSD accepted corporate contributions and used these funds to make in-kind
14 contributions in connection with DeMaio's exploration of federal candidacy.¹² According to

⁸ See *id.* at 21. The only subsequent receipt disclosed by RSD during this period was a \$500 loan from DeMaio on June 1, 2013. See *id.* at 25.

⁹ The article further states that prior to DeMaio's declaration as a federal candidate, the names of RSD staff, including DeMaio, were removed from the RSD website, and that RSD and Carl DeMaio for Congress shared a phone number; DeMaio reportedly stated that he personally paid for the phone line. See Compl. at 2 n.1, citing Claire Tragesar and Brooks Williams, *Carl DeMaio: 'The Future Something,'* KPBS NEWS, June 19, 2013, <http://www.kpbs.org/news/2013/jun/19/carl-demaio-congress-reform-san-diego-campaign-fin/>.

¹⁰ Compl. at 3-6 (Aug. 20, 2013).

¹¹ *Id.* at 2-3, 5.

¹² RSD Resp. at 4.

1 RSD, it only made disbursements relating to its ballot measures and made no expenditures in
2 support of DeMaio's congressional candidacy.¹³

3 RSD asserts that the Complaint wrongly compares RSD's 2013 activity to its 2012
4 activity, explaining that RSD's spending in 2013 is "very similar" to its spending "during the
5 proper period of comparison in 2011," which RSD refers to as the "formulation phase" of
6 researching, polling, and crafting ballot measures for the upcoming election cycle.¹⁴ RSD asserts
7 that its 2012 activity was the "advocacy phase" of the ballot initiative process. Further, in 2012,
8 according to RSD, separate committees handled that phase for each Proposition that appeared on
9 the ballot.¹⁵

10 RSD says it conducted polling in March 2013 on several ballot measure questions it was
11 considering for the 2014 local elections, and cites press coverage of the results of the polling
12 regarding city employee pensions during March 25 - 28, 2013.¹⁶ In addition, RSD asserts that
13 the campaign consulting expenses cited in the Complaint were payments to a consultant for her
14 activities relating to RSD's research and fundraising,¹⁷ and expenses for other vendors relate to
15 email and credit card fees charged on donations raised by RSD during the reporting period.¹⁸

¹³ *Id.*

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ *Id.* See Craig Gustafson, *Frye Leaves Filner Administration*, SAN DIEGO UNION-TRIBUNE, Apr. 3, 2013, <http://www.utsandiego.com/news/2013/Apr/03/frye-leaves-filner-administration-open-government/>.

¹⁷ RSD Resp. at 3.

¹⁸ *Id.*

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1 According to RSD, these expenses are common and made in the normal course of supporting
2 ballot initiatives.¹⁹

3 RSD explains that its payment for DeMaio's airline ticket to Washington, D.C., was in
4 connection with his speech to the American Enterprise Institute ("AEI") on January 15, 2013, on
5 a pension-reform ballot initiative that RSD developed and helped to qualify and pass during the
6 2012 election.²⁰ During that trip, DeMaio also met with potential supporters and partners for
7 RSD's continued activities with reform ballot measures.²¹

8 RSD also asserts that its fundraising activity during the first quarter of 2013 took place
9 "far in advance of Mr. DeMaio becoming a federal candidate."²² Further, RSD asserts that it
10 spent all the money it had before DeMaio became a federal candidate, and its fund balance was
11 brought to \$0 as of May 24, 2013.²³ According to RSD, pursuant to FEC guidance, "since
12 DeMaio is a federal candidate, RSD only accepts federally-permissible funds and [RSD] has
13 held absolutely no federally-impermissible funds since DeMaio became a federal
14 candidate."²⁴

15 **III. LEGAL ANALYSIS**

16 A "contribution" under the Act and Commission regulations is anything of value made by
17 any person for the purpose of influencing any election for federal office, which includes all in-

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* (emphasis in original).

1 kind contributions.²⁵ Funds received and payments made solely for the purpose of determining
2 whether an individual should become a candidate are excepted from the definitions of
3 "contribution" and "expenditure."²⁶ Nevertheless, all funds raised and spent for "testing the
4 waters" activities²⁷ are subject to the Act's \$2,600 per election contribution limit and the
5 prohibition against knowingly accepting or receiving contributions from corporations.²⁸ Further,
6 when an individual becomes a candidate,²⁹ all funds received or payments made in connection
7 with "testing the waters" activities prior to becoming a candidate shall be considered
8 contributions or expenditures under the Act and shall be reported in the first report filed by the
9 candidate's principal campaign committee.³⁰

10 The Act prohibits federal candidates, their agents, and entities directly or indirectly
11 established, financed, maintained, or controlled ("EFMC'd") by federal candidates from
12 soliciting, receiving, directing, transferring, or spending funds in connection with an election for
13 federal office, including funds for any federal election activity, unless the funds are subject to the
14 limitations, prohibitions, and reporting requirements of the Act.³¹

15 The Complaint alleges that RSD's disbursements in the first half of 2013 were not for the
16 purpose of supporting ballot initiatives, but rather for the purpose of exploring a possible federal

²⁵ 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(d)(1).

²⁶ 11 C.F.R. §§ 100.72(a), 100.131(a).

²⁷ Such "testing the waters" activities include, but are not limited to, payments for polling, telephone calls, and travel. *Id.*

²⁸ *Id.*; 2 U.S.C. §§ 441a(a)(1)(A), 441a(f), 441b(a).

²⁹ See 2 U.S.C. § 431(2).

³⁰ See 2 U.S.C. § 434(b); 11 C.F.R. §§ 100.72(a), 100.131(a), 101.3, 104.3(a), 104.3(b).

³¹ 2 U.S.C. § 441i(e)(1)(A).

1 candidacy by DeMaio, and thus violated section 441i(e), *inter alia*. If the allegation is true, the
2 Committee was required to report those in-kind contributions in its first filed disclosure report
3 after DeMaio became a federal candidate. Further, to be in compliance with the Act the in-kind
4 contributions had to comply with the limits and prohibitions of the Act. It is apparent that the
5 Committee reported no in-kind contributions from RSD on its first filed report, that the
6 disbursements alleged to be in-kind contributions to DeMaio were paid for with funds derived in
7 part from corporate donations, and that the disbursements were in an aggregate amount in excess
8 of the Act's contributions limits. Thus, if there is reason to believe that the Complaint's
9 allegations are true, there is reason to believe RSD and DeMaio violated 2 U.S.C. § 441i(e) and
10 the Committee violated 2 U.S.C. § 441i(e) and 434(b). The available information, however, does
11 not support the Complaint's allegation that RSD supported DeMaio by paying for expenses
12 related to testing the waters for a potential candidacy.

13 The core of the Complaint's allegations rests on an inference that RSD's disbursements
14 in the first half of 2013 must have been made to explore DeMaio's potential federal candidacy,
15 because the "expenses cannot be explained as payments made in the normal course of supporting
16 ballot question initiatives."³² The Complaint asserts that RSD's fundraising and spending in the
17 first half of 2013 (when there were no ballot questions before the voters) was abnormally high,
18 even when compared with its spending in 2012, when it was engaged in two ballot measure
19 campaigns.³³ The Complaint highlights RSD's payments in the first half of 2013 for campaign
20 consulting (\$9,000), polling (\$7,500), digital media (\$600), office expenses, paid to Aristotle
21 International, Inc. ("Aristotle") (over \$1,000), and for a trip DeMaio made to Washington, D.C.

³² Compl. at 5.

³³ *Id.* at 2-3, 5.

1 in January (\$323.20).³⁴ The Complaint also notes that RSD held two fundraisers during this
2 time, and received \$53,537 in donations, which surpassed the amount it raised in the entirety of
3 2012.³⁵

4 The Response disputes the Complaint's allegations and provides persuasive information
5 to support its own assertion that RSD's payments during the first half of 2013 were made in
6 connection with its own ballot initiative activities, and not for the purpose of exploring a federal
7 candidacy by DeMaio. In addition to RSD's general explanation that 2013 was the "formulation
8 phase" of ballot measures and should be compared to the 2011 formulation phase, not the 2012
9 "advocacy phase," RSD demonstrates that the specific disbursements alleged to be in connection
10 with DeMaio's potential federal candidacy were actually related to two ballot measures being
11 considered for 2014 — one regarding a proposed tax increase for infrastructure projects, and
12 another regarding the special legislation regarding pensions for former city politicians. RSD
13 provides support for its assertion, including a press article that cites to the polling on the pension
14 issue. *See supra* note 16.

15 RSD explains that campaign consulting fees were for "activities relating to the research
16 and fundraising activities of the committee," fees which are "common and made 'in the normal
17 course of supporting ballot initiatives.'"³⁶ Similarly, the fees to Aristotle and the digital media

³⁴ *Id.* at 3-5.

³⁵ *Id.* at 2-3.

³⁶ RSD Resp. at 3.

1 firm were for email and credit cards fees charged on donations raised by RSD during this
2 period.³⁷

3 With respect to DeMaio's trip to Washington, D.C., RSD shows that DeMaio attended an
4 AEI event in Washington, D.C., in January 2013 to give a speech on a ballot initiative on
5 pension reform that RSD developed and helped to qualify and pass during the 2012 election.³⁸
6 AEI's website contains a video of DeMaio's speech at the event, which addresses pension reform
7 and makes no mention of any federal election campaign.³⁹

8 RSD's disclosure report covering the first half of 2013 also supports its assertions that its
9 activity during the first half of 2013 did not impermissibly support DeMaio's "testing the
10 waters."⁴⁰ As noted, RSD disclosed the receipt of only a single donation after April 2, 2013 —
11 \$100 from a corporation on May 5, 2013, before RSD assertedly zeroed out its account on
12 May 24 and before DeMaio's stated May 27, 2013, decision to run for Congress. RSD disclosed

³⁷ *Id.*

³⁸ *Id.* at 4.

³⁹ See *id.*; <http://www.aei.org/events/2013/01/15/san-diego-public-pension-reforms-a-road-map-for-the-nation/>.

⁴⁰ Other than the allegations in the Complaint, there is little information as to what "testing the waters" activity, if any, DeMaio took prior to his declaration of candidacy. One press article on March 6, 2013, reported that Republican strategists believed that DeMaio was considering running for Congress, but the article makes no mention of any particular "testing the waters" actions by DeMaio. See Kyle Trygstad, *California: Republicans Eyeing DeMaio to Challenge Freshman Peters*, ROLL CALL, Mar. 6, 2013, <http://atr.rollcall.com/california-republicans-eyeing-demaio-to-challenge-freshman-peters/>. Here, the Complaint alleges that RSD's disbursements were made for the purpose of DeMaio testing the waters for a potential candidacy, not that they caused DeMaio to surpass the \$5,000 contribution making him a federal candidate prior to his formal declaration. See 2 U.S.C. § 431(2). And, as our analysis shows, the payments do not appear to have been made in connection with DeMaio testing the waters, or with his ultimate candidacy. Thus, the available information does not suggest that DeMaio became a federal candidate earlier than his stated decision on May 27, 2013.

1 a single subsequent receipt — a \$500 loan from DeMaio on June 1, 2013 — and disclosed that
2 amount as its cash balance as of June 30, 2013.⁴¹

3 Therefore, based on the available information, it does not appear that there is reason to
4 believe the funds RSD spent were to test the waters of a federal candidacy by DeMaio.⁴²
5 Accordingly, we recommend that the Commission find no reason to believe that Respondents
6 violated 2 U.S.C. §§ 441i(e) or 434(b). *See Statement of Policy Regarding Commission Action*
7 *in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16,

⁴¹ See RSD 2013 Mid Year Report at 3, 25. As for RSD's disbursements, although the form used for RSD's disclosure reports does not contain a field for the date of payments made, the available information does not suggest that RSD made disbursements after DeMaio declared his federal candidacy.

⁴² We note that a review of RSD's disclosure reports shows that since DeMaio became a federal candidate, RSD has held no federally-impermissible funds and has accepted only federally-permissible funds. See RSD Report covering July 1 to Oct. 5, 2013, at 3-4, RSD Report covering Oct. 6 to Nov. 2, 2013, at 3, and RSD Report covering Nov. 3 to Dec. 31, 2013, at 3-4, filed with the City of San Diego Office of the City Clerk (portal at <https://ssl.netfile.com/pub2/Default.aspx?aid=CSD>). See also RSD Resp. at 4. The "Donations" page of RSD's website states that "Individuals may contribute up to \$2600 per election cycle. Political Action Committees may contribute up to \$5000 per election cycle. No business or corporate funds can be accepted." See https://fs2.formsite.com/carldemaio/form8/secure_index.html. Further, although several individuals who donated to RSD after DeMaio became a federal candidate also contributed to the Committee, the Commission has determined that a ballot measure committee EFMCD by a federal candidate is not affiliated with the candidate's principal campaign committee and thus they have separate contribution limits. See Advisory Op. 2003-12 (Flake) at 7-8; 2 U.S.C. § 441a(a)(5). Indeed, RSD says that it "has reviewed the FEC Advisory Letter to Congressman Flake which outlines the appropriate way a ballot measure committee can operate" and "continues to use that FEC Advisory Letter to guide its activities to ensure absolute compliance with FEC regulations." RSD Resp. at 5. In addition, RSD disclosed very little spending during the second half of 2013 — an unitemized \$144.01 disbursement plus \$750.00 under "Accrued Expenses (Unpaid Bills)" owed to Aristotle. See RSD Report covering July 1 to Oct. 5, 2013, at 6 and RSD Report covering Nov. 3 to Dec. 31, 2013, at 6.

Further, DeMaio EFMCD a local committee he formed on September 9, 2013 (during his federal candidacy), in connection with a San Diego special mayoral election on November 19, 2013, Carl DeMaio for Mayor 2013 Research Expense Settlement Fund ("DeMaio for Mayor 2013"), although DeMaio did not ultimately run for San Diego Mayor in 2013. See Shira T. Center, *DeMaio Considers Bid for Mayor After Bob Filner's Resignation*, Aug. 23, 2013, ROLL CALL, <http://atr.rollcall.com/demaio-considers-bid-for-mayor-after-bob-filners-resignation/>. DeMaio for Mayor 2013 disclosed the receipt of \$2,240 in donations, all from individuals in amounts less than \$1,000, a \$23,000 loan from DeMaio, and a \$22,341 payment for polling. See DeMaio for Mayor 2013 disclosure report covering Jan. 1 to Oct. 5, 2013, at 3-6. Pursuant to 2 U.S.C. § 441i(e)(2), the prohibitions at section 441i(e)(1) do not apply to the solicitation, receipt or spending of funds by a federal candidate who is also a candidate for state or local office solely in connection with such election if the solicitation, receipt, or spending of funds is permitted under state law and refers only to such state or local candidate). DeMaio for Mayor 2013 appears to have complied with San Diego law, which placed a \$1,000 limit on donations to 2013 mayoral candidates. See The City of San Diego Ethics Commission, *Candidate Manual 2013-2014 Mayoral Special Elections*, rev. Jan. 6, 2014, http://www.sandiego.gov/ethics/pdf/candidatemanual_140106.pdf.


2007) (no reason to believe finding appropriate when the available information fails to give rise to a reasonable inference that a violation has occurred). Finally, we recommend that the Commission close the file.


IV. RECOMMENDATIONS


1. Find no reason to believe that Carl DeMaio for Congress and Paul Kilgore in his official capacity as treasurer violated 2 U.S.C. §§ 441i(e) or 434(b).
2. Find no reason to believe that Reform San Diego with Carl DeMaio f.k.a. Reform San Diego violated 2 U.S.C. § 441i(e).
3. Find no reason to believe that Carl DeMaio violated 2 U.S.C. § 441i(e).
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Close the file.

Date

4-15-14


Kathleen Guith
Deputy Associate General Counsel
for Enforcement


Peter Blumberg
Assistant General Counsel


Mark Allen
Attorney